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10
11 IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

12 In Re:

13 BCE WEST, L.P. *et al.*,

14 Debtors.

15 EID: 38-319719

) Proceedings Under Chapter 11

) Case No. B 98-12547-ECF-CGC

) (Case Nos. 98-12547-ECF-CGC through
98-12570-ECF-CGC)

) Jointly Administered

16
17
18 **OBJECTION OF BANK OF AMERICA, N.A.
TO THE MOTION FILED BY LIFTPAK SERVICES, L.C.**

19 Bank of America, N.A. (formerly Bank of America National Trust and Savings Association),
20 as common collateral agent (the "Agent") for (a) certain pre-petition revolving lenders of the debtors, and
21 (b) certain other pre-petition lenders of the debtors pursuant to that certain Master Lease Agreement No. 2
22 dated as of December 9, 1996, as amended (collectively, the "1996 Lenders"), hereby submits this objection
23 (the "Objection") to Liftpak Services, L.C.'s ("Liftpak") Combined Motion (A) for Relief From Automatic
24 Stay Pursuant to 11 U.S.C. 362 and Abandonment of Property Pursuant to 11 U.S.C. 554, (B) for Allowance
25 and Immediate Payment of an Administrative Claim Pursuant to 11 U.S.C. 503 and (C) for Allowance and
26 Immediate Payment of a Claim Pursuant to 11 U.S.C. 365 (the "Motion"). In support of this Objections,

1 the Agent states as follows:

2 **I. Introduction**

3 Liftpak claims to have entered into fourteen pre-petition leases (the "Leases") for equipment
4 (the "Compactors") with BC Greatlakes, L.L.C. (the "Debtor," and along with the related entities in the
5 above-captioned cases, the "Debtors"). Liftpak further claims that it suffered post-petition losses relating
6 to thirteen of the Leases. The Motion is both procedurally and substantively deficient in numerous respects
7 and the relief sought therein should be denied.

8 **II. The Motion is Procedurally Deficient**

9 Liftpak seeks relief against the Agent, General Electric Capital Corporation ("GECC") and
10 Citizens Bank of Rhode Island (together with GECC and the Agent, the "Agents") based upon their status
11 as agents of certain lending groups. Bankruptcy Rule 7001 requires that if Liftpak seeks monetary relief from
12 the Agents, it must do so by initiating an adversary proceeding. Liftpak has not done so. As a result, the
13 Motion should be denied.

14 **III. The Relief Sought in the Motion Cannot be Granted**

15 In addition to the procedural defect noted above, the Motion fails to state a claim for which
16 relief can be granted and should, pursuant to Rule 7012(b)(6) of the Federal Rules of Bankruptcy Procedure,
17 be dismissed. By way of further response, the Agent asserts that issues of law and disputed material fact exist
18 including, but not limited to the following:

- 19 - **Liftpack's claim, if any, against funds held by the Agents cannot exceed the actual**
20 **compactor proceeds held by the Agents.** Liftpack does not allege that the Agents sold its
21 property, or even that the Agents knew that the Debtors were selling Liftpack's property.
22 Accordingly, even if Liftpack's claims are not barred by prior orders of this Court, there is
23 no logical or legal basis for Liftpack to assert a claim against the Agents for an amount that
24 is greater than the actual sale proceeds (if any) held by the Agents in respect of the
25 Compactors.
26

1 - **Liftpack's claim, if any, against the Debtors cannot exceed the value of the Compactors**
2 **at the time of sale.** Liftpak asserts that the Debtors constructively assumed the Leases and
3 that the Debtors are, therefore, liable for \$7,845 per Compactor -- the alleged value of each
4 Compactor on the petition date. But case law under Section 365 is clear that a debtor must
5 obtain express court authority to assume an unexpired lease. It is undisputed that the Debtors
6 never sought Court approval to assume Liftpack's agreements. Accordingly, any claim
7 Liftpack has against the Debtors -- assuming that Liftpack's factual allegations are true and
8 that Liftpack's claims are not barred by prior orders of this Court -- cannot exceed the value
9 of the Compactors at the time of sale. On information and belief, this value was substantially
10 less than the \$7,845 asserted by Liftpack.

11
12 - **Any administrative claim held by Liftpack is subordinate in priority to the liens and**
13 **priority claims held by the 1996 Lenders.** The 1996 Lenders hold prepetition liens on
14 substantially all of the Debtors' assets to secure payment of more than \$200 million that is
15 owed to the 1996 Lenders. Moreover, the 1996 Lenders hold liens on the Debtors'
16 postpetition assets, as well as a superpriority administrative claim, to secure payment of a
17 portion of the prepetition obligations pursuant to the terms of interim and final cash
18 collateral/adequate protection orders entered in these proceedings. Each of these liens and
19 priority claims is superior in right of payment to any administrative claim that could be
20 awarded to Liftpack.^{1/} Accordingly, while the Agent disputes Liftpack's entitlement to any
21 administrative priority claim, such a claim, if awarded, without the consent of the 1996
22 Lenders, cannot be paid either (a) from the 1996 Lenders' collateral, or (b) prior to full
23 payment of the 1996 Lenders' superpriority claim.

26 ^{1/} Of course, the DIP Lenders enjoy liens and superpriority claims that are senior to those
held by the 1996 Lenders.

1 - **Liftpak is not entitled to freight charges.** Part of the relief sought by Liftpak is
2 reimbursement of freight charges. However, the Leases state that "[u]pon termination hereof,
3 the equipment shall be returned to LIFTPAK by [the Debtor] at [the Debtor's] sole expense,
4 *excluding transportation . . .*" (emphasis added).

5
6 - **The number of compactors stolen or sold post-petition is disputed.** On information and
7 belief, the Debtors dispute Liftpak's allegations concerning the number of Compactors that
8 were sold or stolen post-petition.

9 **Conclusion**

10 For the reasons set forth above, the Agent respectfully requests the Court to deny the Motion
11 in its entirety.

12 Dated: August 31, 1999

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